No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and thus has an interest in ensuring that statutory prerequisites to filing suit are treated as jurisdictional only when Congress clearly requires that result.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Lois Davis sued her employer under Title VII of the Civil Rights Act of 1964, a federal law that prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Davis alleged that her employer had engaged in religious discrimination, sex-based discrimination, and retaliation. Five years into the litigation—after the Fifth Circuit concluded that there were "genuine disputes of material fact" regarding whether Davis held a bona fide religious belief that her employer could have but failed to accommodate,

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Pet. App. 3a—her employer for the first time argued that Davis's claim was barred because she failed to exhaust her administrative remedies before the Equal Employment Opportunity Commission (EEOC). *Id.* This argument came too late, and Davis's claim should be allowed to proceed.

Before filing a Title VII suit alleging discrimination in federal court, a claimant must file a timely charge of discrimination with the EEOC. This so-called exhaustion requirement, everyone agrees, is mandatory and helps ensure that discrimination claims are resolved in an orderly manner. The question in this case, however, is whether the employer's failure to argue exhaustion until five years into the litigation constitutes forfeiture of that argument. And the answer to that question turns on whether the exhaustion requirement is jurisdictional—*i.e.*, whether it goes to the power of the court to hear the case—or whether it is a claim-processing rule that does not go to a court's subject-matter jurisdiction. If the exhaustion requirement is simply a claim-processing rule, defendants can forfeit it by failing to timely raise the argument in court.

This case arises following a years-long attempt by this Court to more carefully police the use of the label "jurisdictional." While "[c]ourts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations," the Court has more recently "evince[d] a marked desire to curtail such 'drive-by jurisdictional rulings.'" *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). That is because "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Henderson ex rel. Henderson v.*

Shinseki, 562 U.S. 428, 434 (2011). Jurisdictional prerequisites cannot be waived or forfeited by parties, and can therefore be raised at any time, including months or years into litigation. Moreover, courts are required to assess jurisdictional requirements *sua sponte*. These rules make sense because jurisdictional requirements go to a court's power to hear a case, but they come at a cost to litigants and to judges, who must address jurisdictional issues even when they are not properly raised and argued.

Given the dramatic consequences that result when a requirement is deemed jurisdictional, this Court has applied a "readily administrable bright line" test for determining whether a particular statutory prerequisite to bringing suit concerns a court's subject-matter jurisdiction: "[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) (emphasis added). And the Court has repeatedly applied that standard to claim-processing rules in the Title VII context and elsewhere, holding that these rules are not jurisdictional unless Congress has clearly stated that they are or there has been a long tradition of treating them as such.

Applying that standard here, Title VII's exhaustion requirement is not jurisdictional. To start, nothing in the text of the exhaustion requirement suggests that it should be construed as a jurisdictional prerequisite to bringing suit. Furthermore, just like other Title VII requirements that this Court has held are non-jurisdictional, the exhaustion requirement does not appear in Title VII's jurisdiction-granting provision, 42 U.S.C. § 2000e-5(f)(3), or in 28 U.S.C. § 1331, which grants federal courts subject-matter jurisdiction over federal

questions. Finally, there is no long-standing tradition of treating the Title VII exhaustion requirement as jurisdictional; to the contrary, this Court has repeatedly implied that the requirement is not jurisdictional, and eight courts of appeals have explicitly held as much. In short, Title VII's exhaustion requirement is a claim-processing rule: "important and mandatory," but not one that should be "given the jurisdictional brand," *Henderson*, 562 U.S. at 435.

ARGUMENT

I. THIS COURT HAS ADOPTED A CLEAR-STATEMENT RULE TO DETERMINE WHETHER STATUTORY REQUIREMENTS ARE JURISDICTIONAL.

1. This case, like many before it, "concerns the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." *Arbaugh*, 546 U.S. at 503. Subject-matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (emphasis omitted); *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." (quotation marks and citation omitted)).

Subject-matter jurisdiction contrasts with other "predicate[s] for relief," which are "merits-related determination[s]" that do not go to a court's jurisdiction. *Arbaugh*, 546 U.S. at 511 (quoting 2 J. Moore et al., *Moore's Federal Practice* § 12.30[1] (3d ed. 2005)). Such predicates include so-called claim-processing rules, "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."

Henderson, 562 U.S. at 435. Though these rules are "important and mandatory," they "should not be given the jurisdictional brand." *Id.*

This Court has repeatedly lamented the lack of precision that is often associated with the term "jurisdiction." "Courts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier*, 559 U.S. at 161. "[R]ecent cases," however, "evince a marked desire to curtail such drive-by jurisdictional rulings, which too easily can miss the critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Id.* (quotation marks and citations omitted); *see Steel Co.*, 523 U.S. at 91 ("drive-by jurisdictional rulings . . . have no precedential effect"); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.").

To bring order to these categorizations, this Court has developed a "readily administrable bright line" test for determining whether a particular statutory prerequisite to bringing suit is jurisdictional. *Arbaugh*, 546 U.S. at 516. Specifically, "[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Id.* at 515-16 (emphasis added); *see Henderson*, 562 U.S. at 439 (a provision is not jurisdictional if its language "provides *no clear indication* that Congress wanted that provision to be

treated as having jurisdictional attributes" (emphasis added)). If the legislature does not "clearly state[]" such an intention, then the statutory limitation is simply "an element of a plaintiff's claim for relief," not a jurisdictional prerequisite. *Arbaugh*, 546 U.S. at 515-16; *see United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015) ("making a statute of limitations jurisdictional . . . requires [a] *plain statement*; otherwise, we treat a time bar as a mere claims-processing rule" (emphasis added)).

Requiring Congress to clearly state that a particular prerequisite is jurisdictional makes sense given the significant consequences that attach to jurisdictional requirements. *See Henderson*, 562 U.S. at 434 (calling a requirement jurisdictional "is not merely semantic but [a question] of considerable practical importance for judges and litigants"). Indeed, "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Id.*

To start, our justice system ordinarily "relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006). And failure to "raise a claim for adjudication at the proper time" generally results in "forfeiture of that claim." *Id.* at 356-57; *see Henderson*, 562 U.S. at 434 ("For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times.").

By requiring litigants to raise all arguments in defense of their position early in litigation, the system "induce[s] the timely raising of claims and objections," which allows courts "to determine the relevant facts and adjudicate the dispute" in the first instance. *Puckett v. United States*, 556 U.S. 129, 134 (2009). Put

differently, "waiver and forfeiture rules . . . ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008).

Jurisdictional requirements, however, upend the ordinary operation of these rules. "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). Thus, if a particular prerequisite goes to a court's subject-matter jurisdiction, a litigant can raise that issue "at any time," *Henderson*, 562 U.S. at 434, including after a trial has concluded, on appeal, or after a remand. Parties can even engage in "sandbagging," *i.e.*, "remaining silent about [an] objection and belatedly raising the error only if the case does not conclude in [their] favor." *Puckett*, 556 U.S. at 134; *Henderson*, 562 U.S. at 434-35 ("a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction"). Indeed, as this Court has recognized, "a party may raise [a jurisdictional] objection *even if the party had previously acknowledged the trial court's jurisdiction*." *Henderson*, 562 U.S. at 435 (emphasis added). This type of gamesmanship can tax judicial resources by requiring courts to expend time and energy on the merits of a case, only to have to dismiss the case months or years into litigation because of an argument that the court lacked jurisdiction which could have been—but was not—raised earlier.

Relatedly, "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514; *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("subject-matter delineations must be policed

by the courts on their own initiative even at the highest level"). Jurisdictional requirements, then, impose a burden on courts, both at the trial and appellate level, to determine whether those requirements are met in every case. This can often be time-consuming and difficult without the cooperation of the parties: "if subject-matter jurisdiction turns on contested facts," the judge might have to "review the evidence and resolve the dispute on her own." *Arbaugh*, 546 U.S. at 514.

These costs to the judicial system are necessary when a particular issue actually goes to jurisdiction—that is, the power of a court to hear a case. But "[b]ecause the consequences that attach to the jurisdictional label may be so drastic," this Court has "br[ought] some discipline to the use of this term." *Henderson*, 562 U.S. at 435. Congress must "clearly state[]" its intention that a particular prerequisite is jurisdictional for those drastic consequences to follow. *Arbaugh*, 546 U.S. at 515. If Congress has not spoken clearly, the Court will presume that the requirement is a claim-processing rule—"mandatory" to be sure, but not "given the jurisdictional brand," *Henderson*, 562 U.S. at 435.

2. This Court has applied this clear-statement test many times, both in the Title VII context and elsewhere, and has repeatedly rejected claims that statutory prerequisites are jurisdictional unless Congress has clearly stated that they are jurisdictional, or there is a long tradition of treating them as jurisdictional. To determine whether Congress has clearly stated an intent that the prerequisite be jurisdictional, the Court has looked to the text of the prerequisite itself, as well as to whether it is located in the jurisdictional provision of the law in question. Where the text "does not speak in jurisdictional terms or refer in any way to

the jurisdiction of the district courts," *Arbaugh*, 546 U.S. at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)), this Court has consistently held that Congress did not clearly state its intention to make the prerequisite jurisdictional.

Applying this standard, this Court has twice addressed the jurisdictional nature of *Title VII* statutory prerequisites, and both times held that the prerequisite at issue is not jurisdictional. In *Arbaugh v. Y & H Corp.*, this Court held that Title VII's limitation of covered employers to those with 15 or more employees—the employee-numerosity requirement—is not a jurisdictional prerequisite to filing suit. 546 U.S. at 504. First, the Court concluded that "[n]othing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met." *Id.* at 514.

Second, the Court concluded that the structure of Title VII provided no indication that the employee-numerosity requirement was jurisdictional. Specifically, the Court explained that two provisions grant district courts jurisdiction over Title VII claims. 28 U.S.C. § 1331 grants federal courts subject-matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." And 42 U.S.C. § 2000e-5(f)(3) provides that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter."[2]

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[2] When Title VII was passed, Section 1331 contained an amount-in-controversy requirement: claims could not be brought under Section 1331 unless the amount in controversy exceeded $10,000. 28 U.S.C. § 1331(a) (1964 ed.). Thus, Title VII's separate jurisdiction-conferring provision "assured that the amount-in-controversy limitation would not impede an employment-

Critically, the Court observed that "neither § 1331, nor Title VII's jurisdictional provision . . . specifies *any* threshold ingredient" for bringing suit. *Arbaugh*, 546 U.S. at 515 (emphasis added). The Court contrasted these provisions with 28 U.S.C. § 1332—the provision granting federal courts jurisdiction over diversity actions—which includes a jurisdictional "monetary floor." *Id.* "[T]he 15-employee threshold," by contrast, "appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id.* (quoting *Zipes*, 455 U.S. at 394). The Court thus concluded that Congress had not "clearly state[d]" that the employee-numerosity requirement "shall count as jurisdictional." *Id.*

Similarly, in *Zipes v. Trans World Airlines, Inc.*, this Court held that Title VII's statutory time limit for filing an EEOC charge is not a jurisdictional prerequisite for filing suit in federal court. 455 U.S. at 393; *see Reed Elsevier*, 559 U.S. at 166 ("*Zipes* . . . held that Title VII's requirement that sex-discrimination claimants timely file a discrimination charge with the EEOC before filing a civil action in federal court was nonjurisdictional."). The Court explained that Title VII's jurisdiction-granting provision "does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC"; "[i]t contains no reference to the timely-filing requirement." *Zipes*, 455 U.S. at 393-94; *see id.* at 393 n.9 (specifying that 42 U.S.C. § 2000e-5(f)(3) is Title VII's jurisdictional provision). Moreover, "[t]he provision specifying the time for filing

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discrimination complainant's access to a federal forum." *Arbaugh*, 546 U.S. at 505. Now that the amount-in-controversy threshold has been eliminated for federal claims, "Title VII's own jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), has served simply to underscore Congress' intention to provide a federal forum for the adjudication of Title VII claims." *Id.* at 506.

charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 394. The Court acknowledged that its prior cases "contain scattered references to the timely-filing requirement as jurisdictional," but noted that "the legal character of the requirement was not at issue in those cases." *Id.* at 395.

The *Zipes* Court also placed weight on a prior case, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), in which the Court held that certain unnamed class members in a Title VII suit who had not filed administrative charges with the EEOC could still remain part of a class in federal court. *Id.* at 771. As *Zipes* explained, "[i]f the timely-filing requirement were to limit the jurisdiction of the District Court to those claimants who have filed timely charges with the EEOC," the *Franks* district court "would have been without jurisdiction to adjudicate the claims of those [class members] who had not filed" before the EEOC first. 455 U.S. at 397. But this Court "did not so hold." *Id.* Instead, the Court held that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." *Id.*

The outcomes of these two Title VII cases—holding that certain statutory prerequisites are mandatory but not jurisdictional—are mirrored in this Court's treatment of similar prerequisites in other statutory contexts. For instance, in *Reed Elsevier, Inc. v. Muchnick*, this Court held that the Copyright Act's requirement that copyright holders register their works before suing for copyright infringement "is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction." 559 U.S. at 157. The Copyright Act requires that "no civil action for infringement

of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). The Court concluded that this language does not "clearly state[]" that the registration requirement is jurisdictional. *Reed Elsevier*, 559 U.S. at 163 (quoting *Arbaugh*, 546 U.S. at 515). Moreover, "§ 411(a)'s registration requirement . . . is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction" over copyright claims—namely, 28 U.S.C. §§ 1331 and 1338(a). *Id.* at 164-65.

Tellingly, the Court compared this registration requirement to "Title VII's requirement that sex-discrimination claimants timely file a discrimination charge with the EEOC before filing a civil action in federal court." *Id.* at 166. As the Court explained, "[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.'" *Id.* (quoting *Zipes*, 455 U.S. at 393). The Court also noted that it has "treated as nonjurisdictional other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit," *id.*—citing *Jones v. Bock*, 549 U.S. 199 (2007), in which the Court held that the Prison Litigation Reform Act's administrative exhaustion requirement is an "affirmative defense," *id.* at 211.

Similarly, in *Henderson ex rel. Henderson v. Shinseki*, the Court held that a deadline for filing a notice of appeal with the U.S. Court of Appeals for Veterans Claims is not jurisdictional. 562 U.S. at 431. Even though the relevant statutory provision provides that "a person adversely affected by [a Board of Veterans' Appeals] decision shall file a notice of appeal with the Court [of Appeals for Veterans Claims] within 120

days after the date on which notice of the decision is mailed" "[i]n order to obtain review by the Court," 38 U.S.C. § 7266(a), this Court concluded that "[t]he terms of the provision . . . do not suggest, much less provide clear evidence, that the provision was meant to carry jurisdictional consequences," *Henderson*, 562 U.S. at 438. Though it is "true that § 7266 is cast in mandatory language," "'all mandatory prescriptions, however emphatic, are [not] . . . properly typed jurisdictional.'" *Id.* at 439 (quoting *Union Pacific R.R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U.S. 67, 81 (2009)). In short, "the language of § 7266 provides *no clear indication* that Congress wanted that provision to be treated as having jurisdictional attributes." *Id.* (emphasis added).

Moreover, as the Court also noted, "Congress elected not to place the 120-day limit" in the Veterans' Judicial Review Act's jurisdictional provision. *Id.* That provision grants the U.S. Court of Appeals for Veterans Claims "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" and the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. § 7252(a). "Nothing in this provision . . . addresses the time for seeking Veterans Court Review." *Henderson*, 562 U.S. at 439-40. Thus, the Court concluded that while the deadline for filing a notice of appeal is "an important procedural rule," it "does not have jurisdictional attributes." *Id.* at 441-42.

The only exception to this Court's clear-statement rule is when there is a long tradition of treating a particular requirement as jurisdictional. For instance, in *Bowles v. Russell*, 551 U.S. 205 (2007), the Court held that the statutory deadline for filing an appeal in a U.S. Court of Appeals is jurisdictional. *Id.* at 206-07.

The Court noted that it had "long held" that this limitation was jurisdictional, and that "even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction." *Id.* at 209, 210. And this Court noted that "the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction." *Id.*

Similarly, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), the Court held that the requirement that a lawsuit be filed in the Court of Federal Claims within six years of the time it accrues is jurisdictional. *Id.* at 132. Though acknowledging that "the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver," *id.* at 133, the Court noted that it had held the requirement to be jurisdictional since at least 1883, *id.* at 134 (citing *Kendall v. United States*, 107 U.S. 123 (1883)), and therefore "[b]asic principles of *stare decisis* . . . require[d] [it] to reject this argument," *id.* at 139.

In short, outside of cases where a requirement has long been considered to be jurisdictional by this Court and others, this Court has consistently and strictly applied the clear-statement test to determine when a statutory prerequisite is jurisdictional. It should apply that same test here.

3. Petitioner understandably seeks to avoid the clear-statement rule, suggesting instead that the appropriate test is not whether Congress has "clearly stated" an intent to make a requirement jurisdictional, but rather whether Congress's intent to preclude district court jurisdiction was "fairly discernible in the statutory scheme." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (quoting *Block v. Cmty.*

Nutrition Inst., 467 U.S. 340, 351 (1984)); *see* Pet'r Br. 20. But the three cases on which Petitioner relies for this rule are entirely inapposite.

First, in *Thunder Basin Coal Company v. Reich*, this Court considered *not* whether an administrative exhaustion requirement is jurisdictional, but rather whether the Federal Mine Safety and Health Amendments Act's statutory scheme permits federal district courts to exercise jurisdiction over Mine Act–related claims *at all*. Under the Mine Act's scheme, the Secretary of Labor is empowered to compel compliance with the Act, and mines can challenge such enforcement before the Federal Mine Safety and Health Review Commission. 510 U.S. at 204. A decision of that Commission can then be reviewed *by a U.S. Court of Appeals*—not a district court—and "the jurisdiction of the court shall be exclusive and its judgment and decree shall be final," except for Supreme Court review. 30 U.S.C. § 816(a)(1).

Rather than proceed by way of the Commission and a U.S. Court of Appeals, however, the petitioner in *Thunder Basin* attempted to file a preenforcement action in federal district court, arguing that certain representatives of the miners' union who would observe the Secretary's inspection were not properly selected pursuant to the statute. 510 U.S. at 204-05. The Court held that the structure of the Act "demonstrates that Congress intended to preclude challenges" in district court because "[t]he Act's comprehensive review process does not distinguish between preenforcement and postenforcement challenges, but applies to all violations of the Act and its regulations." *Id.* at 208-09. Moreover, the Court noted legislative history in which "Congress expressly eliminated the power of a mine operator to challenge a final penalty assessment *de novo* in district court." *Id.* at 211. For those reasons,

the Court found a "'fairly discernible' intent to preclude district court review in the present case." *Id.* at 216 (quoting *Block*, 467 U.S. at 351).

Notably, the Court did *not* hold that the Mine Act's exhaustion requirement before the Commission was a jurisdictional prerequisite to suit in federal court. Rather, the Court held that it was fairly discernible that Congress intended for the district courts to *play no part* in the statutory scheme established by the Mine Act. In other words, federal district courts could never have jurisdiction over Mine Act claims. The Court never even addressed the distinction between claim-processing rules and jurisdictional prerequisites, let alone limited the clear-statement rule that governs that distinction.

Relatedly, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court held that petitioners could bring a collateral constitutional challenge to the Board's structure in federal district court. *Id.* at 489. Again, what was at issue in *Free Enterprise Fund* was whether a certain type of claim could be brought as a stand-alone action in federal district court *at all*. The Court enunciated the same rule from *Thunder Basin*: "[p]rovisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 207, 212). The Court concluded that the district court could exercise jurisdiction over petitioners' collateral constitutional claims, which were outside of the Commission's expertise. *Id.* at 490-91. In other words, the Court decided that a certain type of claim could be brought in federal district court, *not*

that a certain prerequisite was or was not jurisdictional.

Finally, in *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), the Court considered whether the Civil Service Reform Act of 1978 "provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." *Id.* at 5. Under the statutory scheme, federal employees ordinarily may obtain review of adverse employment actions before the Merit Systems Protection Board (MSPB), and then may appeal to the U.S. Court of Appeals for the Federal Circuit, which has "exclusive jurisdiction" over appeals from a final decision of the Board. 28 U.S.C. § 1295(a) & (a)(9). As in *Thunder Basin*, the plaintiff sought to avoid this statutory scheme altogether and file a claim that a particular provision is unconstitutional in federal district court.

The Court reasoned that the Act's "elaborate framework . . . indicates that extrastatutory review is not available to those employees to whom the [Act] grants administrative and judicial review." *Elgin*, 567 U.S. at 11 (quotations marks, citations, and emphasis omitted). Moreover, the Court concluded that "[n]othing in the [Act's] text suggests that its exclusive review scheme is inapplicable simply because a covered employee challenges a covered action on the ground that the statute authorizing that action is unconstitutional." *Id.* at 13. In short, constitutional claims by covered employees—like all other employment claims—must be brought to the Board and then the Federal Circuit, not to a district court.

Importantly, the *Elgin* Court actually *contrasted* the MSPB review scheme with EEOC review. The Court noted that "[w]hen a covered employee 'alleges that a basis for the action was discrimination'

prohibited by enumerated federal employment laws," the Civil Service Reform Act "allows the employee to obtain judicial review of an unfavorable MSPB decision by filing a civil action . . . in federal district court." *Id.* at 13 (quotation marks and citation omitted). The fact that Congress knew how to permit district court jurisdiction over certain types of employee claims—namely, Title VII claims—but did not provide an avenue to bring the plaintiff's constitutional claim in district court "indicate[d]" to the Court "that Congress intended no such exception." *Id.*

In short, *Thunder Basin*, *Free Enterprise Fund*, and *Elgin* applied the "fairly discernible" standard to a different question than the one at issue here. Those cases considered whether a particular statutory scheme permitted federal district court jurisdiction over certain types of claims at all. The Court did not consider in those cases whether a particular statutory prerequisite to bringing a district court claim is jurisdictional. *See* Resp. Br. 2 (noting that these cases "decide[] *which court* has jurisdiction, not *which requirements* are jurisdictional"). And it never limited the applicability of the clear-statement rule to that question. For those reasons, this Court should apply the clear-statement rule in this case, as it has done in all cases where the jurisdictional nature of a statutory prerequisite to filing suit is at issue.[3]

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[3] Other cases that Petitioner cites are good examples of "drive-by jurisdictional rulings" that this Court has insisted "have no precedential effect." *Steel Co.*, 523 U.S. at 91. For instance, in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982), this Court observed that courts of appeals "lack[] jurisdiction to review objections" that are not initially presented to the NLRB. *Id.* at 666. However, whether presenting an argument to the NLRB before raising it in a court of appeals is truly a jurisdictional requirement was never at issue in that case. Similarly, in *McNeil v. United States*, 508 U.S. 106 (1993), the Court

II. CONGRESS HAS NOT CLEARLY STATED THAT TITLE VII'S EXHAUSTION REQUIREMENT IS JURISDICTIONAL.

For all the reasons that this Court has repeatedly held that other, similar statutory prerequisites are not jurisdictional, it should likewise hold that Title VII's exhaustion requirement is not jurisdictional.

First, the text of Title VII provides no indication—let alone a clear one—that Congress intended the exhaustion requirement to be jurisdictional. The exhaustion requirement says that if the EEOC dismisses a charge, fails to file a civil action, or has not entered into a conciliation agreement, the EEOC "shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). This provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes*, 455 U.S. at 394.

Second, the structure of Title VII also provides no indication that Congress intended the exhaustion requirement to be jurisdictional. Title VII's exhaustion requirement "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [such] claims." *Reed Elsevier*, 559 U.S. at 164 (quoting *Arbaugh*, 546 U.S. at 514-15). As described above, federal district courts have subject-matter jurisdiction over Title VII claims based on 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3). But "neither

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referenced in passing a statutory exhaustion requirement under the Federal Tort Claims Act as a "necessary predicate[] to the invocation of the court's jurisdiction," *id.* at 111, even though the jurisdictional nature of the provision had no significance in the case.

§ 1331, nor Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3) . . . specifies any threshold ingredient akin to 28 U.S.C. § 1332's monetary floor." *Arbaugh*, 546 U.S. at 515.[4] Thus, neither the text nor the structure of Title VII provides a clear indication that Congress intended the exhaustion requirement to limit the district court's subject-matter jurisdiction.

Third and finally, there is no long tradition of treating Title VII's exhaustion requirement as jurisdictional, as there was in *Bowles* and *John R. Sand & Gravel Company*. In fact, just the opposite. This Court has repeatedly suggested that Title VII's exhaustion requirement is not jurisdictional. As explained above, in *Zipes*, the Court specifically said that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." 455 U.S. at 397. And in *Reed Elsevier*, the Court referred to *Zipes* as holding that "[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a jurisdictional prerequisite to suit.'" 559 U.S. at 166 (quoting *Zipes*, 455 U.S. at 393). The Court went on to say that "[w]e similarly have treated as nonjurisdictional other types of threshold requirements that claimants must complete, *or exhaust*, before filing a lawsuit." *Id.* (emphasis added). On top of that precedent from this Court, eight courts of appeals have held

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[4] Petitioner claims that all of § 2000e-5(f) should be considered Title VII's jurisdictional provision, Pet'r Br. 42-43, but the only provision that actually speaks to jurisdiction is § 2000e-5(f)(3). No doubt that is why this Court has specifically referred to "§ 2000e-5(f)(3)" as "Title VII's jurisdiction-granting section." *Reed Elsevier*, 559 U.S. at 162; *see Arbaugh*, 546 U.S. at 515 (referring to § 2000e-5(f)(3) as "Title VII's jurisdictional provision" because it "authoriz[es] jurisdiction over actions 'brought under' Title VII").

that exhaustion under Title VII is not jurisdictional. *See* Cert. Opp. 14. Thus, rather than a tradition of treating this requirement as jurisdictional, there is a tradition of just the opposite.

Petitioner focuses on the important policy reasons that Congress chose to require claimants to go to the EEOC before proceeding to federal court, noting that Congress sought to encourage non-judicial resolution of employment discrimination claims, and that it wanted to permit the EEOC to bring its own enforcement actions in the public interest. Pet'r Br. 28-29. But this Court has rejected the notion that "a condition should be ranked as jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier*, 559 U.S. at 169 n.9. In any event, those objectives would not be meaningfully hindered even if the exhaustion requirement were not jurisdictional. After all, claim-processing rules are "important and mandatory" even if they are not "given the jurisdictional brand." *Henderson*, 562 U.S. at 435. Holding that they are not jurisdictional simply means that a defendant cannot try his luck on the merits of a discrimination claim, lose those arguments at trial or on appeal, and then bring up an exhaustion defense for the first time years into the litigation—as Petitioner did in this case, *see* Pet. App. 14a (petitioner "waited five years and an entire round of appeals all the way to the Supreme Court before it argued that Davis failed to exhaust").

Holding that the exhaustion requirement is not jurisdictional is also not likely to be of much consequence in most discrimination cases. Indeed, this issue will be relevant "only when the defendant has waived or forfeited the issue." *McQueen ex rel. McQueen v. Colo. Spring Sch. Dist. No. 11*, 488 F.3d 868, 873 (10th Cir. 2007). And employers are typically sophisticated

parties who are unlikely to forget to raise such an obvious defense. Petitioner speculates that defendants may purposely choose not to raise this defense because they would prefer that cases not be presented to the EEOC. Pet'r Br. 30. But Petitioner offers absolutely no evidence that this type of gamesmanship occurs in the eight circuits that have already held that the exhaustion requirement is not jurisdictional. Indeed, the substantial costs associated with federal court litigation likely explain why it has not.

In short, "[g]iven the unfairness and waste of judicial resources entailed in tying the [exhaustion] requirement to subject-matter jurisdiction," it is "the sounder course to refrain from constricting § 1331 or Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), and to leave the ball in Congress' court." *Arbaugh*, 546 U.S. at 515 (citation and quotation marks omitted). Because Congress has not "clearly state[d]" that the requirement "shall count as jurisdictional," *id.*, this Court should not treat it as such.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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